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Supreme Court of the United States

OCTOBER TERM, 1961

No. 720

GULF BOTTLERS, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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INDEX

	PAGE
I. CITATION TO OPINION BELOW	1
II. JURISDICTION	2
III. THE QUESTION PRESENTED FOR REVIEW	2
IV. STATUTES INVOLVED	2
V. STATEMENT OF THE CASE	3
VI. REASONS FOR GRANTING THE WRIT	6
VII. CONCLUSION	16
APPENDIX A—Opinion of United States Circuit Court of Appeals for the District of Columbia in this case	19
APPENDIX B—Judgment of the Court of Appeals; Order Denying Rehearing; Decree	35
APPENDIX C—Decision and Order of the National Labor Relations Board in this Case*	39
APPENDIX D—Statutes Involved	45

* The intermediate report of the Trial Examiner which was adopted by the National Labor Relations Board and which consist of 62 printed pages is contained in the Joint Appendix as printed for the use of the Court below and certified to this Court.

AUTHORITIES CITED

Decisions of the Board

Alamo Express, Inc., 119 N.L.R.B. 6, 13	7
American Oil Co., Inc., 14 N.L.R.B. 990	12
American Steel Scraper Co., 29 N.L.R.B. 939	12
Atlas Tag Company, 84 N.L.R.B. 685, 686 (1949)	7 *et seq.*
California Walnut Growers Assn., 18 N.L.R.B. 493	12
Continental Oil Company, 85 N.L.R.B. 828 (1949)	7
Continental Pipe Line Co., 78 N.L.R.B. 379, 383	7
Dunes Enterprises Inc., 124 N.L.R.B. 805, 806 (1959)	7
The Eavey Company, 115 N.L.R.B. 1779, 1781	7

AUTHORITIES CITED—(Continued)

Decisions of the Board—(Continued) PAGE.

Frost Rubber Works, 23 N.L.R.B. 1071 12
Houston Terminal Whse. & Cold Storage Co., 107 N.L.R.B. 290, 291 (1953) 7
Peter Kiewit Sons, 106 N.L.R.B. 195 (1953) 7
Jahn & Ollier Engraving Co., 24 N.L.R.B. 893 12
Lundahl Motor Inc., 85 N.L.R.B. 224, 225 (1949) 7
Mardrill Inc., 119 N.L.R.B. 1174, 1181 7
Mine Safety Appliances Co., 85 N.L.R.B. 290, 296 14
Northern Redwood Lumber Co., 88 N.L.R.B. 277 (1950) 7
Peninsular Metal Prod. Corp., 116 N.L.R.B. 452, 455 (1956) 7
Ramsey Motor Car Co., Inc., 99 N.L.R.B. 408, 410 (1952) 7
Schult Trailers, Inc., 28 N.L.R.B. 975, 993 12
Schwarze Electric Co., 16 N.L.R.B. 246 12
Swift & Co., 15 N.L.R.B. 992 12
Wasatch Oil Refining Co., 76 N.L.R.B. 417, 423 (1948) 7
Wells Dairies Cooperative, 109 N.L.R.B. 1450 4
West Coast Paperboard Mills, 76 N.L.R.B. 1236, 1238 14

Decisions of the Courts

Colgate-Palmolive Peet Co. vs. N.L.R.B., 338 U.S. 355, 363, 1949 14
Crooks vs. Harrelson, 282 U.S. 55 at 59 9
Federal Communication Commission vs. Allentown Broadcasting Corp., 349 U.S. 358, 365 (1954) 6
N.L.R.B. vs. Beaver Meadow Creamery, 215 F. 2d 247, 251 (CA-3, 1954) *13 et seq.*
N.L.R.B. vs. Budd Mfg. Co., 169 F. 2d 571, 576 (CA-6) *7 et seq.*
N.L.R.B. vs. Leland Gifford, 200 F. 2d 620, 625 (CA-1, 1952) 13, 17
N.L.R.B. vs. Quincy Steel Casting Co., 200 F. 2d 293, 295 (CA-1, 1952) *13 et seq.*
N.L.R.B. vs. Southern Bleachery & Print Works Inc., 257 F. 2d 235 (CA-4, 1958) 4

AUTHORITIES CITED—(Continued)

Decisions of the Courts—(Continued) PAGE

N.L.R.B. vs. Syracuse Stamping Co., 208 F. 2d 77 (CA-2) 7

N.L.R.B. vs. Whitin Machine Works, 204 F. 2d 883, 886 (CA-1, 1953) 7

Ohio Power Company vs. N.L.R.B., 176 F. 2d 385, 387 (CA-6, 1949) Cert. Den. 338 U.S. 899 ..... 7 *et seq.*

Packard Motor Car Company vs. N.L.R.B., 330 U.S. 485, 489 (1946) 11

Red Star Express Lines of Auburn Inc. vs. N.L.R.B., 196 F. 2d 78 (CA-2) 7

United States vs. American Trucking Assoc. Inc., 310 U.S. 534, 543 17

STATUTES

Labor Management Relations Act, 29 U.S.C. 151 *et seq.*, 61 Stat. 136.

Section 2(3) 2, 3

Section 2(11) ..... 2, 3 *et seq.*

Section 10(f) 4

Section 14(a) 2, 3

28 U.S.C. Section 1254(1) 2

28 U.S.C. 2112(a), 72 Stat. 941 4

TREATISES

Vol. 1, Legislative History of Labor Management Relations Act, 1947 (1st ed. 1948)

425 10

308 11

302 12

Supreme Court of the United States

OCTOBER TERM, 1961

No.

GULF BOTTLERS, INC., Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Petitioner, Gulf Bottlers, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, dated November 9, 1961.

I.

CITATION TO OPINION BELOW

The original opinion of the United States Court of Appeals for the District of Columbia on November 9, 1961, is reported in F. 2d . Petition for rehearing was denied on November 30, 1961. The opinion and *per curiam* denying rehearing, together with the original judgment and final decree of the Court enforcing the previous order of the National Labor Relations Board, issued December 5, are printed in App. A and B hereto.

infra, pages 19 and 35 respectively. The decision and order of the Labor Board is printed in Appendix C, *infra*, page 39.

II.

JURISDICTION

The date of the judgment sought to be reviewed is November 9, 1961; the date of the decree of the United States Court of Appeals for the District of Columbia ordering that the order of the National Labor Relations Board be enforced was December 5, 1961.

The date of an order denying the petition for rehearing filed by petitioner, Gulf Bottlers, Inc., was November 30, 1961.

The jurisdiction of this Court to review this case on certiorari is envoked under 28 U.S. Code, Section 1254(1).

III.

THE QUESTION PRESENTED FOR REVIEW

Whether the National Labor Relations Board and the Circuit Court of Appeals for the District of Columbia properly held that individuals who admittedly possess and frequently exercise the power to hire, fire and lay off other employees of the company were not excluded supervisors under Section 2(11) of the Labor Management Relations Act of 1947.

IV.

STATUTE INVOLVED

The statute involved is: 29 U.S. Code, Section 151, *et seq.*, 61 Stat. 136, known as the Labor Management Relations Act of 1947 and in particular Subsection 2(3) and (11) and Subsection 14(a).

The pertinent sections of these statutes are printed in Appendix D, *infra*, page 45.

V.

THE STATEMENT OF THE CASE

This is an unfair labor practice case brought by the National Labor Relations Board against the petitioner for alleged violations of the Labor Management Relations Act of 1947.

The Parties

Gulf-Bottlers, Inc., (hereinafter referred to as "the company" or "the employer") petitioner herein, a bottler and distributor of soft drinks in the New Orleans area, was the subject of two complaints issued by the General Counsel of the National Labor Relations Board in 1959. These complaints were based on charges filed by the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America AFL-CIO. The complainants alleged that the company had engaged in unfair labor practices directed against certain individuals engaged by it as driver-salesmen.

The Company's Defense

From the outset of the proceedings before the Labor Board, and continuously throughout the entire course of the litigation, the company has urged that the Board was without jurisdiction to handle the complaints involving the driver-salesmen in view of their excluded status as supervisors under definitions and exclusions as stated in 2(11), 2(3) and 14(a) of the Act.

The Board's Decision

The Labor Board and its Trial Examiner concluded that, despite the fact that the driver-salesmen hired, fired

and laid off other employees of the company, they were not supervisors.

The Board and the Trial Examiner based their decision upon a 1954 Board case (*Wells Dairies Cooperative*, 109 N.L.R.B 1450) and the decision of the Circuit Court of Appeals for the 4th Circuit in *National Labor Relations Board vs. Southern Bleachery and Print Works, Inc.*, 257 F. 2d 235 (1958) enforcing 118 N.L.R.B. 299, cert. den. 359 U.S. 911 (1959). Petitioner pointed out to the Court of Appeals that in regard to the two cases cited by the Board, the former simply ignored the statutory definition and that the latter was clearly distinguishable on the facts.

The Decision of the Court of Appeals

On appeal, the Circuit Court of Appeals for the District of Columbia[1] upheld the decision of the Labor Board that the driver-salesmen were not supervisors, but based its decision, not upon the jurisprudence relied upon by the Board, but upon other reasons:

> " 'There is no question, and I find, that the driver-salesmen at all times material herein who were entitled to have helpers, had and exercised the authority to hire, lay off or discharge those helpers,' the examined found. If that be so, the Employer argues, these driver-salesmen must be supervisors. Thus the charges against the Employer which involved alleged impairment of the rights of the driver-salesmen do not come within the jurisdiction of the Board.
>
> "We find ourselves unable to accept the Employer's contention, so earnestly presented. The whole purpose of section 2(11) was to place into the em-

[1] This Court had jurisdiction to review the final order of the Labor Board under Section 10(f) of the Labor Management Relations Act as amended, 29 U.S.C. 151 *et seq.*, (61 Stat. 136) and 28 U.S.C. 2112(a) (72 Stat. 941).

ployer category 'those who acted for management not only in formulating but also in executing its labor policies.' We are satisfied that the examiner and the Board alike correctly interpreted as routine the extent of the driver-salesmen's **direction of the helpers.**[2] That the latter in the circumstances described became employees is clear. That the driver-salesmen became supervisors is not. In no meaningful sense was their **exercise of authority 'in the interest of the employer.'** On the contrary, we see the record before us demonstrating that the driver-salesmen **were motivated by and were acting in their own interest. Engaging the helpers**[3] had the effect of reducing the manual burdens of the driver-salesmen, expediting the service to their route customers, and increasing their potential for higher commissions, even to the point of their foregoing $15 each week which otherwise they would have received.

"We are unable to accept the contention that the driver-salesmen were denying themselves the benefit of the Act. Their own responsibilities to the Employer were in nowise diminished. They were no more identified with management if they **engaged** helpers. With helpers or without, they were no less employees of the company, bound to execute its policies and to carry out the duties assigned to them, with no voice whatever in management except in their authority over a few casual employees selected at their own discretion. We conclude in light of the purposes of the amendment and on the facts here, that these driver-salesmen were not deprived of their status as employees. And the

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[2] The test of "responsibly directing" is but one of 12 such tests set out in the disjunctive. So that the failure by the driver-salesmen to direct their helpers in other than a routine manner does not mitigate the fact that they used their "independent judgment" in hiring, firing and laying off other employees, thereby passing three of the other tests of Section 2(11).

[3] The Court apparently ignored the fact that the Trial Examiner found that the driver-salesmen not only "engaged the helpers", thus passing one test of Section 2(11), but also fired and layed off, thereby passing two more of the tests.

Employer so treated them, assisted in the formation of their Employees Association and negotiated the agreement prescribing the terms and conditions of their employment. Considering the objectives of the Act as a whole, they were entitled to its benefits. We find no error." (Emphasis added)

Chief Judge Wilbur K. Miller dissented stating that driver-salesmen were supervisors within the literal meaning of Section 2(11) of the Act and that the Court had no right to rewrite the section in order to exclude from its scope individuals who were clearly within its terms.

VI.

REASONS FOR GRANTING THE WRIT

THE SUPREME COURT'S POWER OF SUPERVISION SHOULD BE EXERCISED WHERE A COURT OF APPEALS HAS CREATED A NEW AND CONFUSING STANDARD TO MEASURE A LEGAL STATUS PREVIOUSLY DEFINED IN PRECISE DETAIL BY STATUTE.

The Court should exercise its supervisory power here where there is a conflict between the Courts of Appeal and where the decision of the Court of Appeals of the District of Columbia has raised a substantial question in the administration of the Labor Management Relations Act, specifically in the determination of the issue of supervisory status.[4]

Prior to this decision when the issue arose—"Is this individual a supervisor?"—the question was answered

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[4] "The correction of errors of law by the Court of Appeals on review of administrative agencies is committed to this Court through its certiorari jurisdiction."

Federal Communication Commission v. Allentown Broadcasting Corp., 349 U.S. 358 (1954) at 365.

with reasonable certainty by measuring the authority of the individual over his fellow employees, using the statutory authorities set out in Section 2(11) of the Act. Since Section 2(11) lists the authorities in the disjunctive, the decisions of the Labor Board and the Courts of Appeal have been in accord that the mere existence or possession of any one of these authorities was sufficient to establish supervisory status.[5] Thus, supervisory status was measured by such tests as, "Does he **possess** the authority to hire other employees? To fire other employees? To lay off other employees? * * * etc."

However, this simple method or resolving the issue of supervisory status has been abandoned by the instant

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[5] "This section is to be interpreted in the disjunctive * * * *and the possession of any one of the authorities listed in Section* 2(11) places the employee invested with this authority in the supervisory class." (Emphasis added) *Ohio Power Co. v. N.L.R.B.*, 176 F. 2d 385, 387 (CA-6 1949) Certiorari Denied, 338 U.S. 899.

See also, *N.L.R.B. v. Budd Mfg. Co.*, 169 F. 2d 571 (CA-6) at page 576; *N.L.R.B. v. Whitin Machine Works*, 204 F. 2d 883, 886 (CA-1 1953) wherein the court said:

"* * * the bare existence of any one of the powers enumerated in Section 2(11) makes a man a supervisor."

Following this line of jurisprudence the Board has held:

"The several authorities listed in Section 2(11) are stated in the disjunctive and accordingly the courts have held that *possession* of any one of the enumerated functions *is sufficient* to classify an individual as a supervisor, *N.L.R.B. v. Budd Mfg. Co.*, 169 F. 2d 571 (CA-6); *Ohio Power Co. v. N.L.R.B.*, 176 F. 2d 385 (CA-6); *N.L.R.B. v. Syracuse Stamping Co.*, 208 F. 2d 77 (CA-2); *Red Star Express Lines of Auburn, Inc. v. N.L.R.B.*, 196 F. 2d 78 (CA-2)."

(Emphasis added) *Mardrill, Inc.*, 119 N.L.R.B. 1174, 1181.

In other cases the Board, without hesitation, has designated individuals as excluded supervisors, even though they supervised but one or two employees, and on occasion *no* employees. *Houston Terminal Whse. & Cold Storage Co.*, 107 N.L.R.B. 290, 291 (1953); *Atlas Tag Co.*, 84 N.L.R.B. 685 (1949); *Lundahl Motor, Inc.*, 85 N.L.R.B. 224, 225 (1949); *Continental Pipe Line Co.*, 78 N.L.R.B. 379, 383; *Ramsey Motor Car Co., Inc.*, 99 N.L.R.B. 408, 410 (1952); *Continental Oil Co.*, 85 N.L.R.B. 828 (1949); *Northern Redwood Lumber Co.*, 88 N.L.R.B. 277 (1950); *Peter Kiewit Sons*, 106 N.L.R.B. 195 (1953); *Peninsular Metal Products Corp.*, 116 N.L.R.B. 452, 455 (1956); *Wasatch Oil Refining Co.*, 76 N.L.R.B. 417, 423 (1948); *Alamo Express, Inc.*, 119 N.L.R.B. 6, 13; *The Eavey Co.*, 115 N.L.R.B. 1779, 1781.

As recently as August of 1959, the Board held two individuals to be supervisors although both supervised but one other employee apiece, *Dunes Enterprise, Inc.*, 124 N.L.R.B. 805, 806 (1959). The exact same result was reached by the Board under the same circumstances in *Atlas Tag Co.*, 84 N.L.R.B. 685, 686.

decision, and a heretofore obscure phrase in the statutory definition has been elevated to a position of prominence, being given an interpretation that is legally novel. Despite the fact that the individuals working for this employer possessed and exercised the granted authority to hire, fire and lay off other employees, the Court gave no appreciable weight to the possession of such authority, but turned instead to the agency test, "in the interest of the employer" and converted that phrase in the definition into a test of motivation to be applied as a condition precedent to the application of the other tests set out in that definition.

While the phrase, "in the interest of the employer," within the context of the definition would seem to imply no more than that the employer delegates one of the listed authorities to his minor executive personnel, this decision of the Court of Appeals has found far more implied. The Court holds that unless the motivation of the individual in exercising those supervisory authorities possessed is exclusively beneficial to the employer then such individual is not, in law, a supervisor despite his hiring, firing and laying off of other employees. Thus, the phrase in question, as interpreted by this decision, now reaches into the obscure and dark corners of psychological motivation and behavior characteristics.

Until this decision, there had been no question concerning an individual, on an employer's payroll, possessing actual authority to hire, fire and lay off other employees. He was a "supervisor" within the meaning of Section 2(11). However, if this decision stands, there is no longer any certainty in this area since any supervisor now may nullify his supervisory status if his exercise of his supervisory authorities is motivated by self-interest

at any time.[6] With the shift in emphasis from the possession of authority to the issue of motivation behind the exercise of authority, the individual becomes a legal hybrid, an "employee" who possesses the statutory prerogatives of management without the status accorded to such possession by Section 2(11).

This strained interpretation[7] of Setcion 2(11) provoked the comment from the Chief Judge of the Circuit Court of Appeals of the District of Columbia, in his dissent, that he did not believe that, "any Court has the right to rewrite the section in order to exclude from its scope a class which is clearly within its terms." This critical comment by the dissenting Judge is certainly supported by the legislative history of the phrase in question.

The definition of supervisory status in Section 2(11) of the 1947 Taft-Hartley Act originated in the Ellender Amendment to the Case Bill of 1946. The entire issue of supervisory status was heatedly debated in the 79th Congress during the controversy over the 1946 Case Bill. This amendment to the Wagner Act was passed by Congress and vetoed by President Truman. Subsequently, the same supervisory definition was repeated with certain deletions in the Taft-Hartley Amendments of 1947

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[6] There is no explanation by the Court as to the status of the individual at those times when he exercises his authority, exclusively in the interest of the employer.

[7] "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. *Monson v. Chester*, 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of th law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the Courts." *Crooks v. Harrelson*, 282 U.S. 55, at 59.

and enacted over a second Presidential veto.* In 1946, when the terms of the supervisory definition were being drafted, as the Ellender Amendment to the Case Bill, there existed a pertinent precedent in Section 2(2) of the Wagner Act defining the terms "employer", as follows:

> "The term 'employer' includes any person acting **in the interest of an employer.**"

This phrase from the definition of "employer", constituting a very broad agency test, was incorporated into the "supervisory" definition of the Ellender Amendment. Since both the definition of "employer" in Setcion 2(2) of the old Wagner Act, and "supervisor" in the more recent legislation, included personnel who acted for management, it was only logical that the definitions be consistent. In any event it can hardly be argued that the phrase, "in the interest of the employer," could have one broad meaning in the definition of "employer" and another completely different and restrictive meaning in the definition of "supervisor".

But regardless of the origin of the phrase, Congress itself left a most explicit instruction as to its plain intent in the use of the words "in the interest of the employer" when it enacted the "supervisor" definition in 1947:

> "So, by this bill [Taft-Hartley] Congress makes clear once more what it tried to make clear when, in passing the Act, [Wagner Act—1935] it defined

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* The legislative history of Section 2(11) indicates that the legislators deliberately removed from the definition of "supervisor' a provision requiring a *number* of employees to be supervised:

> "The language in the proposed amendment is patterned after that contained in the Ellender Amendment to last year's Case Bill which was adopted by a majority vote of the Senate and concurred in by the House. It differs from it in three respects, *by eliminating (1) the requirement that the supervisor must have five employees in his charge* * * *" Senate Report No. 195 on S. 1126, Legislative History of Labor Management Relations Act,* 1947, Vol. 1, Page 425, First Edition, 1948.

as an 'employer', not an 'employee', any person 'acting in the interest of the employer' * * * ."

" * * * What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness', changed the law: That no one, whether employer or employee, need have **as his agent** one who is obligated to those on the other side * * * ." (Emphasis added)

House Report No. 245 on H.B. 3020, Legislative History of the Labor Management Relations Act, 1947, Vol. 1 at page 308, First Edition 1948.

Is there room to doubt that Congress intended the same **agency** test in 1947 as it did in 1935?

While there has been no jurisprudence directly interpreting the phrase in the context of the supervisory definition until the instant case, there has been jurisprudence interpreting that phrase as part of the 1935 "employer" definition. The Supreme Court interpreted the phrase simply as a broad agency test to identify those to whom the employer had delegated authority and for whose acts the employer was held responsible.[9]

In fact, judicial interpretation of the phrase, "in the interest of the employer" was so broad that in 1947, Congress responded to the complaints of employers that they were being charged with unfair labor practices by third persons not even in their employ. Congress amended the definition of "employer" to narrow the responsibility

[9] "It is an adaptation of the ancient maxim of the common law, respondeat superior, by which a principal is made liable for the tortious acts of his agent and the master for the wrongful acts of his servants. * * * Hence, it was provided that in administering this act the employer, for its purposes, should be not merely the individual or corporation which was the employing entity, but also others, whether employee or not, who are 'acting in the interest of an employer.'"
Packard Motor Co. v. National Labor Relations Board, 330 U.S. 485, 489 (1946).

of the employer for acts committed by third persons.[10] The present definition of "employer" is, "any person acting **as an agent of the employer directly or indirectly.**" But the earlier and even broader phrase, "in the interest of the employer," originating in the Wagner Act "employer" definition, and first proposed in the Ellender Amendment to the Case Bill of 1946, was retained in the 1947, "supervisors" definition even while its parent was being narrowed in that same Act.

This legislative history does not indicate that Congress was even remotely concerned with creating psychological tests to narrow or restrict supervisory status on the basis of motivational factors or behavior characteristics.

Not only does the legislative history of this phrase fail to support any inference that the legislators were interested in the reason why individuals exercise authority granted to them by their employer but the juris-

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[10] The clause "acting as an agent of an employer" in the present definition of "employer" derives from the House Bill, and the House Committee's explanation of the clause is therefore relevant. In reporting the bill, the House Committee said:

"The old act included in the definition of 'employer' 'any person acting in the interest of an employer'. Under this language the Board frequently 'imputed' to employers anything that anyone connected with an employer, no matter how remotely, said or did, notwithstanding that the employer had not authorized what was said or done, and in many cases even had prohibited it. By such rulings the Board often was able to punish employers for things they did not do, did not authorize, and had tried to prevent. (See *Matter of American Steel Scraper Co.*, 29 N.L.R.B. 939; *Matter of Schult Trailers, Inc.*, 28 N.L.R.B. 975, 993; *Matter of Jahn & Ollier Engraving Co.*, 24 N.L.R.B. 893; *Matter of Schwarze Electric Co.*, 16 N.L.R.B. 246; *Matter of Swift & Co.*, 15 N.L.R.B. 992; *Matter of American Oil Co., Inc.*, 14 N.L.R.B. 990; *Matter of Frost Rubber Works*, 23 N.L.R.B. 1071; *Matter of California Walnut Growers Assn.*, 18 N.L.R.B. 493.)

"The bill, by defining as an 'employer' 'any person acting as an agent of an employer' makes employers responsible for what people say or do only when it is within the *acutal* or *apparent* scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and to unions." —House Report 245, 80th Cong., p. 11. Legislative History of the Labor Management Relations Act, 1947, Vol. 1 at page 302.

prudence of the other Circuits since 1947, have repeatedly stated that it is the mere **possession** of any one of the enumerated powers of Section 2(11) that is critical, not the **exercise** of such power, much less the even more remote question of the inner motive underlying the exercise of such authority.[11] Thus there is an open conflict between the decision of this Court and three other Courts of Appeal.

Legislative history and jurisprudence aside, nothing could be clearer than the language of the definition itself that, "the term 'supervisor' means any individual **having** authority in the interest of the employer to hire, transfer, suspend, etc. * * * "

Notwithstanding any of the above, the instant decision clearly establishes a new standard of "motivation". If, in hiring or firing other employees, the individual possessing such authority is motivated by a desire to perform his own job better, or to service his employer's customers faster, or to sell more of the employer's product, under this decision his exercise of such authority becomes so tainted with self-interest as to counteract his actual possession of those authorities. The net result of the decision is that the possession of these critical authorities is ignored and this area of the law becomes unrecognizable. Whereas before[12] the emphasis had always been upon the possession of the authorities listed by Congress, now the emphasis is upon the exercise of those authorities. Petitioner submits that the obvious error of the Court of Appeals lay in the fact that while the Court of Appeals

[11] *Ohio Power Co.* (CA-6), *supra*; *N.L.R.B. v. Leland Gifford*, 200 F. 2d 620, 625 (CA-1, 1952); *N.L.R.B. v. Beaver Meadow Creamery*, 215 F. 2d 247, 251 (CA-3, 1954); *N.L.R.B. v. Quincy Steel Casting Co.*, 200 F. 2d 293, 295 (CA-1, 1952).

[12] For example, the Board, noting that the employee in question had *never* exercised his authority to transfer, lay off or recall other employees, has stated:

Continued

may feel that, "in no meaningful sense was their exercise of authority 'in the interest of the employer,'" it is none the less true that the employer here saw fit to grant such authority. The Court of Appeals may disagree with the employer that such a system was beneficial to him but such a system existed and every Court should deal with facts as they exist regardless of the Court's opinion as to the merits of such a system. The authority did flow from the employer to the driver-salesmen; authority, which, had it not been granted to these individuals, would, of necessity, have been exercised by some other member of management. Obviously, the helpers here had to be hired, fired and layed off by someone in authority. Section 2(11) clearly provides that whoever has such authority is a supervisor.[13] It is a difficult lesson in legal semantics to justify reasoning that an inherent power can be delegated by the possessor, received and exercised by the grantee, ratified repeatedly over a long period of

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[12] (Continued)

"• • • the fact that he is vested with such authority makes him a supervisor within the meaning of the Act."

West Coast Paperboard Mills, 76 N.L.R.B. 1236, at 1238.

In another case, the Board stated:

"However, the test is the existence and extent of the salaried inspector's authority, and not the frequency with which it has been exercised."

Mine Safety Appliances Co., 85 N.L.R.B. 290, at 296.

[13] The Court of Appeals in this decision apparently had some difficulty in reconciling itself to the legislative will. The Court speaking of Congress, said.

"Surely it contemplated some other test than is afforded by a sheerly literal reading of Section 2(11)."

Instant decision at page 29 of App. A.

The Supreme Court, on the other hand, has instructed:

"It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute."

Colgate-Palmolive Peet Co. v. N.L.R.B., 338 U.S. 355, 363, 1949.

years by the grantor and yet not be legally, "in the interest of" the original possessor and grantor of such authority. Yet such reasoning is the turning point of this case:

> "In no meaningful sense was their exercise of authority 'in the interest of the employer'. On the contrary, we see the record before us demonstrating that the driver-salesmen were motivated by and were acting in their own interest".

The Court has overlooked that the driver-salesmen could not have "acted in their own interest" over a long period of years in hiring, firing and laying off other employees if the employer had not first given them those authorities. It was the established labor policy of this employer that these driver-salesmen have and exercise the discretion and authority to hire, fire and lay off their helpers rather than anyone else in management performing this duty. When the driver-salesmen received this authority and used it they were executing the labor policy of this employer towards the helpers, using a tool, their authority, to render their own service more efficient.

If these same driver-salesmen, in using a truck provided by the employer, while within the scope of their general authority, injured a third person, certainly neither this Court nor any other would even consider whether the salesmen's use of the truck was motivated by an inner desire to help himself earn more commissions or to sell more of the employer's product. Such speculation is obviously beside the point. The only question is: Did the employer authorize him to use that truck; did the employer grant him the power to drive the truck on the streets in the performance of his job?

In the one case the tool given the individual is au-

thority to use a truck, in the other case authority to hire and fire helpers. Both tools benefit the driver-salesmen; the use of neither tool mitigates the fact that the grant of authority came from the employer after his considered decision that it would be to his benefit or in his "interest" ultimately.

Thus in a very "meaningful sense" the **grant of authority** to hire, fire and lay off helpers was "in the interest of the employer" within the agency concept intended.

But whether the more remote and irrelevant question of "exercise" of that authority was in the employer's interest, or the driver-salesmen's, **such power was granted** by the employer to be exercised within the scope of the driver-salesmen's general authorities and that is the only pertinent, reasonable application of that phrase.

Finally, it is apparent that the Court of Appeals has posed a new question in Labor Relations, "When is a supervisor not a supervisor". The Court has answered its own question by stating: "When his supervisory acts are motivated by some desire to help himself." Under this new doctrine an individual's legal status apparently may change as often and as secretly as his motivations change. It is not difficult to imagine the degree of confusion that will exist in this area of the law as a result of placing such emphasis on as unstable a factor as personal motivation rather than the factual question of possession of the authorities listed in Section 2(11).

VII.

CONCLUSION

Petitioner submits that such confusion in an area that was previously settled is unwarranted where the

statute is clear and unambiguous;[14] where the legislative history offers no support for the Court's novel theory; and where the jurisprudence of three other Courts of Appeal is in conflict and implies a totally different approach to the definition.[15]

Petitioners, therefore, respectfully pray that the Court exercise its supervisory jurisdiction to resolve the existing conflict between the Courts of Appeal and to resolve the substantial question as to "supervisory" status under

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[14] "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."

United States v. American Trucking Assn., Inc., 310 U.S. 534, 543.

See also; *Ohio Power Co. v. N.L.R.B.*, 176 F. 2d 385, 387, 388 (CA-6, 1949); Cert. Den. 338 U.S. 899. The *Ohio Power Co.* case has been cited not only by the Board (*Eacey Co.*, 115 N.L.R.B. 1779) but also by other Courts of Appeal; *N.L.R.B. v. Beaver Meadow Creamery*, 215 F. 2d 247, 252 (CA-3, 1954); *N.L.R.B. v. Quincy Steel Casting Co.*, 200 F. 2d 293, 295 (CA-1, 1952).

[15] Thus the Court of Appeal for the Sixth Circuit in a leading case, wherein the alleged supervisor directed only two other employees, has held:

"The Board also erred as a matter of law in considering the test of the performance of supervisory duties to be the frequency of their exercise. * * * *It is existence of the power which determines the classification.* That power responsibly to direct exists here is uncontradicted."

(Emphasis added) *Ohio Power Co., supra*, at page 388.

The Court of Appeal for the First Circuit, in reviewing the status of an alleged supervisor, under whom there were no employees working at the time of the decision, reversed the Labor Board, and said:

"The statute cited in footnote 3, *supra*, does not make exercise of any one or more of the powers enumerated therein the test of supervisory status. It makes the existence of one or more of the powers the test."

"On the other hand, we think the statute does mean that once an individual has actually been clothed with genuine power to perform a supervisory function, he thereupon becomes a 'supervisor' even though he may not often find it necessary to exert the power conferred. That is to say, one clothed with real power to discipline other employees, for instance, would be *ipso facto* a 'supervisor'."

(Emphasis added) *N.L.R.B. v. Leland Gifford*, 200 F. 2d 620, 625 (CA-1, 1952).

the Labor Management Relations Act as raised by this decision.

Respectfully submitted,

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LAWRENCE J. MOLONY.
February ....., 1962

CERTIFICATE

I hereby certify that the attorneys for the National Labor Relations Board, Mr. Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington, D. C., and the attorneys for the Union, James C. Paradise, General Counsel, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, 2347 Vine Street, Cincinnati 19, Ohio and Mozart G. Ratner, 1411 K Street, N.W., Washington 5, D. C., have been served with a copy of this petition for a writ of certiorari by depositing of same in the United States mails, first class, postage paid, addressed to their offices on this ..... day of ....., 1962.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 15759

INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

v.

GULF BOTTLERS, INC.,
Intervenor.

No. 15929

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

GULF BOTTLERS, INC.,
Respondent.

No. 15988

GULF BOTTLERS, INC.,
Petitioner,

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petitions to Review and on Petition for Enforcement of an Order of the National Labor Relations Board

Decided November 9, 1961

Mr. James C. Paradise, with whom *Mr. Mozart G. Ratner* was on the brief, for petitioner in No. 15,759.

Mr. Laurence J. Molony, of the bar of the Supreme Court of Louisiana, *pro hac vice*, by special leave of court, with whom *Messrs. Rocco C. Siciliano* and *Charles A. Hobbs* were on the brief for respondent in No. 15,929 and petitioner in No. 15,988. *Messrs. Rocco C. Siciliano* and *Charles A. Hobbs* entered appearances for intervenor in No. 15,759.

Mr. Melvin Pollack, Attorney, National Labor Relations Board, with whom *Messrs. Stuart Rothman*, General Counsel, National Labor Relations Board, *Dominick L. Manoli*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent in Nos. 15,759 and 15,988 and petitioner in No. 15,929.

Before WILBUR K. MILLER, *Chief Judge*, and DANAHER and BASTIAN, *Circuit Judges*.

DANAHER, *Circuit Judge*: The Board [1] by its unanimous decision and Order [2] adopted the findings and conclusions of the trial examiner with reference to certain unfair labor practices charged against Gulf Bottlers, Inc., the Employer.

Involved in the Union's petition, No. 15759, is an entity known as Gulf Bottlers Employees Association which the Board found has been formed with the assistance and support of the Employer. The Board's Order directed that the Employer withdraw and withhold all recognition from the Association unless and until the Association after a Board election shall have been certified as the bargaining representative of the employees. Mean-

[1] Acting by a division of three members as authorized by 29 U.S.C. § 153(b) (Supp. II, 1960).

[2] 127 N.L.R.B. 850 (1960).

while for the protection of the employees the terms and conditions of an outstanding contract with the Association were to be continued. The Union here asserts that the Board erred in failing to find that the Employer did not dominate the Association and further in not ordering that the Association be disestablished.

The Employer, in No. 15988, has challenged the Board's finding that the Association had been assisted in violation of sections 8(a)(2) and (1) of the Act.[3] The Employer further protests the Board's finding that two driver-salesmen had been discriminatorily discharged in violation of sections 8(a)(3) and (1) of the Act. The Employer contends that in any event the Board's order is without foundation on the ground that its various driver-salesmen were not entitled to the protection of the Act in that they were "supervisors," as defined in section 2(11).[4]

The Board asks that its order be enforced in all respects.

I—As to No. 15759

Domination by the Employer

The Employer[5] distributes Pepsi-Cola and other bottled drinks in and about New Orleans over various routes which are serviced by some 36 or more driver-salesmen. The job of each such driver includes the driving of a truck, making deliveries to customers on his route, effectuating collecting and assisting the customer in displaying merchandise. The driver-salesmen also solicits new business and checks and hauls back to the plant the empty

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[3] 29 U.S.C. §§ 158(a)(2), (1) (1958).

[4] 29 U.S.C. § 152(11) (1958). The text in full appears in Part III *infra*.

[5] Gulf Bottlers, Inc. employs a sales manager and five route managers who maintain supervision over several routes. The latter are not here involved, for it is beyond question that they acted in the interest of the Employer and clearly are "supervisors" within the meaning of the Act.

bottles. If he shall receive complaints from a customer he must, if possible, act upon them himself; otherwise he must submit the problem to his route manager. The exact status of this class of employee presents our principal problem, discussed in Part III. We turn first to the other issues.

In November 1958, Walker and Fazzio, the two alleged discriminatees, met with a union representative, arranged to undertake an organizing campaign and were supplied with union application cards. On December 6, 1958, the Union, claiming to represent a majority of the driver-salesmen, requested recognition. Two days later the petition for certification was sent to the Employer describing the unit as "All driver-salesmen, including full service drivers and their helpers . . . ." but excluding "all other employees . . . and all supervisors as defined in the Act as amended." The Employer's President England on December 8, 1958 called Fazzio to his office and asked if he had signed a union card. Fazzio replied that he had not. England asked Fazzio to let him know if he heard anything about the Union. The following day he sent again for Fazzio. He wanted to know about the "gripes" which might be disturbing the men, adding that if Fazzio would let him know "of anybody else making mistakes, such as signing a union card," Fazzio would have his job then and ten years later.

On December 9, sales manager Weber told Walker that England wanted to see him. Did Walker "hear anything about any union activity going around?" Walker replied in the negative, but added that he would not inform England about union activity. England talked to all of the driver-salesmen seeking to ascertain whether or not they were "interested" in or had joined a union. On December 10, 1958, when the drivers reported for work they were called into the office. England wanted to know

why they wanted a union and "what their gripes were." After discussion of terms and conditions of employment England asked the employees "to make a decision whether they wanted the union" or not. He sought to separate the employees into two groups, those for and those against a union. The meeting lasted several hours before England told Fazzio, who had been elected spokesman for the pro-union group, that "the routes won't go out today, tomorrow or any other day with you fellows. As of today, the plant is closed."

That night the men were requested to return to work on the following day. When they returned from their routes, having worked as usual, England talked to a group of the drivers suggesting that they form their own association to be called the Gulf Bottler Employees Association, and that he could draw up a satisfactory contract. He told the group that they could get a lawyer and offered to pay one.

On December 12, 1958, various driver-salesmen, including Fazzio and Walker, were called to England's office where he talked about a contract with the proposed association. Shortly thereafter, the trial examiner and the Board found, England had his attorney draft a collective bargaining agreement which he requested the employees both individually and in groups to sign. Without further details, it is clear that various representations as to terms were made by England who sought to procure the signatures of the various driver-salesmen. All except Fazzio and Walker signed. One or two meetings of the thus recognized Association were held on company property. Before one such meeting commenced, England talked to the men but did not stay for the meeting. The Association elected its own officers and adopted a charter and by-laws. Thereafter, collecting dues and otherwise functioning through the procedures so created, the Association

seems to have been controlled by the employees who were in position to and did operate their own organization. In January 1959, the Employer began deducting Association dues from the drivers' pay pursuant to their individual authorizations and the separate agreement with the Association.[6]

The agreement between the Employer and the Association, General Counsel's Exhibit 4, is before us. It comprises a fair labor-management contract with clauses providing for seniority rights, holidays, holiday pay, sick leave, vacations and many fringe benefits, arbitration and grievance clauses and other procedures.[7] Each driver-salesman was guaranteed that the total of his salary and commission would not be less than $75 per week.

On such facts, which are not the subject of real dispute, the trial examiner and the Board found, we think correctly, that the Employer had assisted in the formation of the Association. We have carefully considered the entire record and fail to find evidence which in any substantial degree lends support to the contention of the Union that the Employer dominated the Association after its formaion or in any manner controlled its conduct. The Board did not err in failing to order disestablishment of the Association.[8] The Board's order on this aspect of the case must accordingly be affirmed.

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[6] Meanwhile, on December 16, 1958, the Union had again in writing requested recognition of a unit including the driver-salesmen and their helpers but excluding all supervisors and other employees of the company. At no time did the Employer rely to the Union's requests for recognition.

[7] Each driver-salesman, at his option, was to be allowed the use of a helper for the entire week. Until the formation of the Association, no driver-salesman was entitled to engage a helper unless he maintained a sale quota of not less than 800 cases per week.

[8] We deem reasonable and appropriate those particular portions of the Order precluding further recognition of the Association unless as a "labor organization" it shall have been certified as the exclusive representative of the included employees. Labor Board v. Mine Workers, 355 U.S. 453, 458, 459 (1958). Meanwhile the rights of the employees gained under the contract are not to be prejudiced.

II—As to No. 15988

Discrimination as to Fazzio and Walker

The Employer vigorously argues that Fazzio and Walker had been discharged for cause, thus challenging the findings of the examiner and of the Board that there had been unlawful discrimination. We have carefully explored the record and have fully considered the authorities which counsel so earnestly has urged as controlling.[9]

Our decisions must control[10] as we have applied the 1947 amendments which provide that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." In *Joy Silk Mills v. National Labor Relations Board*[11] we said:

> "The amendment, like its predecessor, does not permit the court to weigh evidence or to substitute its judgment for the Board's as to what conclusions are to be drawn from the evidence."

No great gain will flow from detailed particularization of the conflicting testimony on this aspect of the case. The trial examiner in controlling respects rejected the version submitted by England and expressly credited Fazzio and Walker. The Board adopted his findings and con-

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[9] England in December, having become aware of union activity, sought the advice of counsel. Reasonably, the latter might have relied upon such cases as Sardis Luggage Co. v. National Labor Rel. Bd., 234 F. 2d 190, 196 (5 Cir. 1956); and see additionally, e.g., N.L.R.B. v. Red Wing Carriers, Inc., 284 F. 2d 397 (5 Cir. 1960); N.L.R.B. v. Birmingham Publishing Company, 262 F. 2d 2, 8, 9 (5 Cir. 1959); National Labor Relations Board v. McGahey, 233 F. 2d 406, 410, 413 (5 Cir. 1956).

[10] The Union here filed No. 15759 only a week after the Board's Decision and Order had come down. The Employer, three weeks later, filed its petition in the Court of Appeals for the Fifth Circuit whence it was transferred to this Circuit pursuant to the provisions of 28 U.S.C. § 2112(a) (1958). That the "race to the court house" has presented many problems is well known.

[11] 87 U.S. App. D.C. 309, 366, 185 F. 2d 732, 738 (1950), *cert. denied*, 341 U.S. 914 (1951). And see News Printing Co. v. National Labor Relations Board, 98 U.S. App. D.C. 14, 17, 231 F. 2d 767, 770, *cert. denied*, 352 U.S. 845 (1956).

clusions. It is clear that commencing in January, England, after seeking the advice of counsel, began to keep a record of alleged derelictions on the part of Fazzio and Walker. He prepared a memorandum of items of dereliction which he said were the basis for their discharge in February, 1959. The record shows that Walker in November, 1958, had threatened to resign but sales manager Weber had persuaded him to reconsider and to continue his employment. He was assured he was a "good man" who had "made more increases than most any man he had." It was not denied that Walker had been requested to remain in the company's employ. Charges against both Fazzio and Walker, concerning, *inter alia*, shortages in their weekly returns lack something in significance when it is noted that the practice was general among the driver-salesmen and had persisted for a long period, but the Employer at all times had made up the shortages from the drivers' accrued earnings. The testimony showed "They hold a week back. Commission and salary is held back." Against background of such sort the examiner stated:

> "In reaching the conclusion that Fazzio and Walker were actually discharged because of their union sympathies or activities, I do not do so on the basis of my appraisal of the weight or quality of such cause but on the basis that an appraisal of it in the light of the entire record shows that it is insincerely raised and was utilized as a pure pretext to mask Respondent's discriminatory purpose."[12]

Were we free to do so we might have concluded that Fazzio, at least, was discharged for cause rather than for labor union activity. We cannot say, however, that both the examiner and the Board could not have concluded

[12] He relied upon such authorities as Wells, Inc. v. National Labor Relations Board, 162 F. 2d 457, 460 (9 Cir. 1947); National Labor Relations Board v. C. & J. Camp, Inc., 216 F. 2d 113, 115 (5 Cir. 1954); the examiner was not unaware of his duty to ascertain the Employer's "real motive." Radio Officers v. Labor Board, 347 U.S. 17, 43 (1954).

otherwise. We are of the view that the issue comes squarely within the pronouncement of the Supreme Court in *Labor Board v. Nevada Copper Co.*[13]:

> "Examination of the record discloses that there was substantial evidence from which the Board could have concluded that respondent's refusal to employ the men was motivated by its belief that they had engaged or threatened to engage in destruction of respondent's property and had threatened to injure some of respondent's managerial employees and members of their families. There was also substantial evidence from which the Board could have concluded, as it did, that respondent's motive for refusing the employment was discouragement of membership in a labor union. The possibility of drawing either of two inconsistent inferences from the evidence did not prevent the Board from drawing one of them, as the court below seems to have thought."

The Board has not been shown to have erred in concluding that the pro-union activity of Fazzio and Walker motivated their discharge. There was evidence of other possible grounds, as has been argued. Taking into account all items of fact heretofore recited and considering the record as a whole, we are persuaded we must affirm the order.[14]

III—As to No. 15988

Supervisors

Section 2(11) of the Act[15] provides:

> "The term 'supervisor' means any individual having authority, *in the interest of the employer*, to hire, transfer, suspend, lay off, recall, promote,

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[13] 316 U.S. 105, 106 (1942).

[14] Ore-Ida Potato Products, Inc. v. N.L.R.B., 284 F. 2d 542 (9 Cir. 1960); National Labor Relations Bd. v. Whitin Machine Works, 204 F. 2d 883 (1 Cir. 1953).

[15] 29 U.S.C. § 152(11) (1958).

> discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." (Emphasis added.)

The trial examiner found that "the driver-salesmen are not supervisors within the meaning of the Act."[16] The Employer vigorously attacks that conclusion, insisting that the true effect of the 1947 amendment was "to deprive the Board of the power to treat supervisory employees as employees"[17] entitled to the protection of the Act. Particularly it is insisted that an employee who is invested by the employer with any one of the 12 authorities enumerated in the section is a supervisor.[18] We are pointed to the "responsibly to direct" and "use of independent judgment" test said to have been applied to the facts in *Ohio Power Co. v. N.L.R.B.*[19]

This court early saw in section 2(11) an unmistakable congressional purpose to deny the benefits of the Act

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[16] The Board agreed, citing "*Wells Dairies Cooperative*, 109 N.L.R.B. 1450; *Southern Bleachery and Print Works, Inc.*, 115 N.L.R.B. 787. See also *N.L.R.B. v. Southern Bleachery & Print Works*, 257 F. 2d 235 (4th Cir. 1958), enforcing 118 NLRB 299, cert. denied, 359 U.S. 911 (1959)." The examiner deemed the Wells Dairies case "controlling."

[17] Eastern Coal Corp. v. National Labor Relations Board, 176 F. 2d 131, 136 (4 Cir. 1949).

[18] National Labor Relations Bd. v. Edward G. Budd Mfg. Co., 169 F. 2d 571, 476 (6 Cir.), *cert. denied sub nom.* Foreman's Association of America v. Edward G. Budd Manufacturing Co., 335 U.S. 908 (1948); also cited to us is National Labor Relations Bd. v. Whitin Machine Works, *supra* note 14, 204 F. 2d 886. But see National Labor Relations Bd. v. Quincy Steel Cast. Co., 200 F. 2d 293, 296 (1 Cir. 1952) and National Labor Relations Board v. Leland-Gifford Co., 200 F. 2d 620, 625 (1 Cir. 1952) wherein the First Circuit reflects its conclusion that an employee may be classified as a "supervisor" when he has "actually been clothed with genuine power to perform a supervisory function"; possession of "real power," not its exercise, is the criterion.

[19] 176 F. 2d 385, 387, 388 (6 Cir.), *cert. denied*, 338 U.S. 899 (1944); cf. National Labor Relations Bd. v. Whitin Machine Works, *supra* note 14, 204 F. 2d at 886.

to "supervisors."[20] It was intended that the employer be given "a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations,"[21] we said in other context.

It has seemed to us that if a mere employee at some stage may become a supervisor, the transition becomes an actuality when he is found to possess real power "in the interest of the employer" to take meaningful action with respect to the statutory tests. It is not alone that he may hire or fire or lay off or discipline. He must do so in the interest of the employer. He must then, when acting, become in effect a part of management, not simply a lead man or straw boss. The entire work force from the president down to the messenger boy in one sense acts in the interest of the employer, as Congress well knew. Surely it contemplated some other test than is afforded by a sheerly literal reading of section 2(11).

We recently spelled out various criteria to be applied by the Board in an individual, case-by-case approach.[22]

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[20] L. A. Young Spring & Wire Corp. v. National Labor Rel. Bd., 82 U.S. App. D.C. 327, 328, 163 F. 2d 905, 906 (1947), *cert. denied sub nom.* Foreman's Association of America v. L. A. Young Spring & Wire Corp., 332 U.S. 837 (1948). Our note 2 there reflected the genesis of the congressional reasoning which predicted the amendment. Congress had in mind supervisory personnel traditionally regarded as part of management.

[21] Carpenters District Council, Etc. v. N.L.R.B., 107 U.S. App. D.C. 55, 57, 274 F. 2d 564, 566 (1959). There is no problem in the case of one who is actually a foreman. But the relevant position is not always as clearly defined. That the question involves various gradations of status may be seen from the following: National Labor Relations Board v. Swift & Company, 240 F. 2d 65 (9 Cir. 1957); National Labor Relations Board v. Osbrink, 218 F. 2d 341, 343, 344 (9 Cir. 1954), *cert. denied*, 349 U.S. 928 (1955); National Labor Relations Bd. v. Parma Water Lifter Co., 211 F. 2d 258, 260, 261 (9 Cir.), *cert. denied*, 348 U.S. 829 (1954); Precision Fabricators v. National Labor Relations Bd., 204 F. 2d 567, 568, 569 (2 Cir. 1953); *National Labor Rel. Bd. v. North Carolina Granite Corp.*, 201 F. 2d 469 (4 Cir. 1953).

Where to draw the line is the constantly recurring problem, with the report cases shedding scant light on the situation here. See additionally, National Labor Rel. Bd. v. Beaver Meadow Creamery, 215 F. 2d 247, 251, 252 (3 Cir. 1954).

[22] Local 636, Etc., Plumbing & Pipe Fit. Ind. of U.S. v. N.L.R.B., 109 U.S. App. D.C. 315, 323, 287 F. 2d 351, 362 (1961).

We had in mind particularly that there must be a determination of status based upon the "nature" of the supervisory position and "how completely the responsibilities of the particular position identify the holder of the position with management," all "because of the infinite possible variations in responsibilities enumerated in § 2(11)."[23]

In Part I, *supra*, we outlined the duties of the driver-salesmen, each in charge of his own route. Before the prospect of a union developed, there was no requirement that a driver-salesman have a helper, indeed he could not have one unless he attained a basic quota of sales.[24] A helper, if engaged, was to assist the driver-salesman in any manner desired by the latter. The helper's chief service, however, was manual. He unloaded from the truck and moved full cases of beverage to the customer's premises whence he hauled out the empties and placed them on the truck. Some helpers separated bottles which had contained orange flavor from cola bottles and placed them in their proper boxes. The helper performed no work for the Employer other than on the truck under direction of the driver-salesman. "Although the Company pays the entire wage of the helper, as a practical matter $15 a week of that pay comes out of the pocket of the drivers since if they refrain from using a helper they get $15 extra pay," the trial examiner noted. The Employer simply added $12 more for the helper for a full week.

The helpers were described as generally illiterate employees, "scared colored men (and some were mere boys)" with a history of casual, unstable employment. They were not permitted to come within the Employer's premises. They gathered each morning, if they desired work, outside

[23] *Ibid.*

[24] After the December 10th meeting, England abolished the quota requirement.

the Employer's plant, there to be selected by a driver-salesman, but the latter might have selected a helper elsewhere. If none was chosen, a driver-salesman reported "no helper." Otherwise an income tax form was filled out and a record of actual service was compiled and turned into the office by the driver-salesman. The driver-salesman laid off his helper, made his own decisions in directing the manner and extent of the helper's service, and discharged him in some situations, as for "sassy" talk or actions which might dissatisfy a customer.

"There is no question, and I find, that the driver-salesmen at all times material herein who were entitled to have helpers, had and exercised the authority to hire, lay off or discharge those helpers," the examiner found. If that be so, the Employer argues, these driver-salesmen must be supervisors. Thus the charges against the Employer which involved alleged impairment of the rights of the driver-salesmen do not come within the jurisdiction of the Board.

We find ourselves unable to accept the Employer's contention, so earnestly presented. The whole purpose of section 2(11) was to place into the employer category "those who acted for management not only in formulating but also in executing its labor policies."[25] We are satisfied that the examiner and the Board alike correctly interpreted as routine the extent of the driver-salesmen's direction of the helpers. That the latter in the circumstances described became employees is clear. That the driver-salesmen became supervisors is not. In no meaningful sense was their exercise of authority "in the inter-

[25] Mr. Justice Douglas dissenting in Packard Co. v. Labor Board, 330 U.S. 485, 496 (1947). Stated in different context to be sure, but nevertheless apt, his observations and the opinion of the Court underlay the 1947 amendment. See L. A. Young Spring & Wire Corp. v. National Labor Rel. Bd., *supra* note 20.

est of the employer." On the contrary, we see the record before us demonstrating that the driver-salesmen were motivated by and were acting in their own interest. Engaging the helpers had the effect of reducing the manual burdens of the driver-salesmen, expediting the service to their route customers, and increasing their potential for higher commissions, even to the point of their foregoing $15 each week which otherwise they would have received.

We are unable to accept the contention that the driver-salesmen were denying themselves the benefit of the Act. Their own responsibilties to the Employer were in nowise diminished. They were no more identified with management if they engaged helpers. With helpers or without, they were no less employees of the company, bound to execute its policies and to carry out the duties assigned to them, with no voice whatever in management except in their authority over a few casual employees selected at their own discretion. We conclude in light of the purposes of the amendment, and on the facts here, that these driver-salesmen were not deprived of their status as employees. And the Employer so treated them, assisted in the formation of their Employees Association and negotiated the agreement prescribing the terms and conditions of their employment. Considering the objectives of the Act as a whole,[26] they were entitled to its benefits. We find no error.

IV—As to No. 15929

Conclusion

Accordingly the Board's order must be enforced. A decree will be submitted.

WILBUR K. MILLER, *Chief Judge*, concurring in part and dissenting in part: As to case No. 15,759, which

[26] Cf. C.I.R. v. Bilder, 289 F. 2d 291, 298, 302 (3 Cir. 1961).

is discussed and decided in Part I of the foregoing opinion, I concur in the court's conclusion that the Board did not err in failing to direct the disestablishment of the Gulf Bottlers Employees Association, and that its order giving effect to its conclusion should be upheld. I dissent, however, from Parts II and III of the majority opinion which deal with case No. 15,988, as I think Fazzio and Walker were legally discharged for cause, and that the driver-salesmen were supervisors within the meaning of Section 2(11) of the Act. It follows, of course, that I dissent also from Part IV of the majority opinion which orders enforcement of the Board's order against Gulf Bottlers, as sought by the Board in case No. 15,929.

In the course of Part II of their opinion dealing with the discharge question, the majority quote the following statement of the examiner as to why he concluded the dismissals were discriminatory:

> ". . . In reaching the conclusion that Fazzio and Walker were actually discharged because of their union sympathies or activities, I do not do so on the basis of my appraisal of the weight or quality of such cause but on the basis that an appraisal of it in the light of the entire record shows that it is insincerely raised and was utilized as a pure pretext to mask Respondent's discriminatory purpose."

This statement, approved by the Board, shows the examiner did not consider the "weight or quality" of the employer's evidence that the men had been discharged for good cause, but ignored it because he thought the employer also had a discriminatory purpose on account of their union activity. To conclude as he did, I think the examiner would have had to find from the evidence as a whole that the cause for dismissal given by the misconduct of the two men played no part in their discharge, or that it

was so weak and unconvincing that union activity was in truth the real motive. In the face of strong and convincing evidence of improper conduct that was legal warrant for discharge, it was impossible, I think, for the examiner to make either of these two findings. In fact, he made neither: he simply said the evidence of legal cause, no matter how great in "weight" nor how fine in "quality," was not to be considered because the men had engaged in union activity of which the employer did not approve.

These two motives for a discharge are not necessarily inconsistent; they are not mutually exclusive. Surely it is not the law that an employer must retain an employee whose insubordinate conduct constitutes legal cause for dismissal, merely because the employee has engaged in union activity with which the employer was not in sympathy. I think the Board erred in approving the examiner's finding of illegal discharges, when it was reached by unlawfully and totally ignoring the evidence presented by the employer.

I disagree with Part III of the majority opinion because I think the driver-salesmen were supervisors within the literal meaning of Section 2(11) of the Act. I do not believe any court has the right to rewrite the section in order to exclude from its scope a class which is clearly within its terms. There is no requirement that the Act apply to all workers, regardless of their status.

As I have indicated, my dissent from Parts II and III of the opinion, which reject Gulf Bottlers' attack on the order, sufficiently explains why I dissent from Part IV, which enforces the Board's order against Gulf Bottlers.

APPENDIX B

United States Court of Appeals
For the District of Columbia
Filed Nov 9—1961
Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1961.

CAPTION OMITTED

On Petitions to Review and on Petition for Enforcement of an Order of the National Labor Relations Board

Before: Wilber K. Miller, Chief Judge, and Danaher and Bastian, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record from the National Labor Relations Board, and in cases No. 15,759 and No. 15,988 on petitions to review and set aside, and in No. 15,929 on a cross-petition for enforcement of, the order of the National Labor Relations Board herein, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by this court that the order of the National Labor Relations Board on review in these cases is affirmed, and that it shall be enforced.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a pro-

posed enforcement decree consistent with the opinion and judgment of this court.

Per Curiam Judge Danaher.

Dated: November 9, 1961.

Separate opinion by Chief Judge Wilbur K. Miller concurring in part and dissenting in part.

United States Court of Appeals
For the District of Columbia
Filed Nov 30 1961
Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1961.

CAPTION OMITTED

Before: Wilber K. Miller, Chief Judge, Danaher and Bastian, Circuit Judges, in Chambers.

ORDER

Upon consideration of the petition for rehearing filed by Gulf Bottlers, Inc., it is

ORDERED by the court that the aforesaid petition for rehearing is denied.

Per Curiam.

Dated: Nov 30 1961

Chief Judge Miller would grant the petition.

ORIGINAL

United States Court of Appeals
For the District of Columbia
Filed Dec 15 1961
Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

CAPTION OMITTED

DECREE

Before: Wilbur K. Miller, Chief Judge and Danaher and Bastian, Circuit Judges.

This cause came on to be heard upon petitions of International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, (No. 15759) and Gulf Bottlers, Inc. (No. 15988) to review and modify an order of the National Labor Relations Board dated May 20, 1960, directed against Gulf Bottlers, Inc., New Orleans, Louisiana, its officers, agents, successors and assigns, and upon answers and a petition (No. 15929) of the Board to enforce said order. The Court heard argument of respective counsel on September 19, 1961 and has considered the briefs and the transcript of record filed in this cause. On November 9, 1961, the court, being fully advised in the premises, handed down its decision granting enforcement of the Board's said order. In conformity therewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, by the United States Court of Appeals for the District of Columbia Circuit, that the said order of the National Labor Relations Board in said proceeding

be, and it hereby is, enforced, and that Gulf Bottlers, Inc., its officers agents, successors and assigns, abide by and perform the directions of the Board in said order contained.

Dated: Dec 5 1961

APPENDIX C

D-1465
New Orleans, La.
127 NLRB No. 107

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 15-CA-1448

GULF BOTTLERS, INC.
and
INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO
and
GULF BOTTLERS EMPLOYEES' ASSOCIATION
Interested Party

Case No. 15-CA-1514

GULF BOTTLERS, INC.
and
INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO

DECISION AND ORDER

On November 27, 1959, Trial Examiner Eugene E. Dixon issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel, the Charging Party, and the Respondent

filed exceptions to the Intermediate Report, together with supporting briefs.

The Board[1] has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case,[2] and hereby adopts the findings,[3] conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Gulf Bottlers, Inc., New Orleans, Louisiana, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, or in any other labor organization, by discharging or in any other man-

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[1] Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

[2] The Respondent has moved to introduce additional documentary evidence or, in the alternative, to reopen the hearing for the purpose of introducing documentary evidence concerning the amount of former employee Walker's shortages the week before he was discharged. As no contention has been made that the evidence which the Respondent seeks to introduce was unavailable at the hearing or is newly discovered, we find that the Respondent has not shown an adequate reason to support its motion, and the motion is hereby denied. *A. M. Andrews Company of Oregon*, 112 NLRB 626. We note, however, that even if we were to permit the evidence to be introduced, we would not deem it of sufficient probative force to warrant setting aside the Trial Examiner's finding that Walker was discriminatorily discharged.

[3] We agree with the Trial Examiner's finding that the Respondent's driver-salesmen are not supervisors within the meaning of the Act. *Welis Dairies Cooperative*, 109 NLRB 1450; *Southern Bleachery and Print Works, Inc.*, 115 NLRB 787. See also *N.L.R.B. v. Southern Bleachery & Print Works*, 257 F. 2d 235 (4th Cir., 1958), enforcing 118 NLRB 299, *cert. denied* 359 U.S. 911 (1959).

ner discriminating against employees in regard to hire or tenure of employment or any terms or condition of employment;

(b) Interrogating employees concerning their union membership, sentiments and activities in a manner constituting interference, restraint or coercion in violation of Section 8 (a) (1) of the Act; threatening employees with loss of employment or the closing of the plant if the aforesaid Union's organizing campaign is successful; and promising benefits to employees if they abandon their adherence to the Union;

(c) Contributing support to Gulf Bottlers Employees' Association or to any other labor organization of its employees;

(b) Recognizing Gulf Bottlers Employees' Association as the representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms or conditions of employment, unless and until the said labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of such employees;

(e) Giving effect to the collective bargaining agreement, dated December 1958, between the Respondent and Gulf Bottlers Employees' Association, or to any extension, renewal or modification thereof, or to any superseding contract, unless and until the said labor organization shall have been duly certified by the National Labor Relations Board as the exclusive representative of its employees: *provided*, however, that nothing in this Decision and Order shall require the Respondent to vary or abandon any wage, hour, seniority, or other substantive fea-

ture of its relations with its employees which the Respondent has established in the performance of this agreement, or to prejudice the assertion by employees of any right they may have thereunder;

(f) In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, or any other labor organization, to bargain collectively through represenatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which the Board finds will effecuate the policies of the Act:

(a) Withdraw and withhold all recognition from Gulf Bottlers Employees' Association as the exclusive bargaining representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until the said labor organization shall have been duly certified by the National Labor Relations Board as the exclusive representative of such employees;

(b) Offer to Dudley Walker and Tony Fazzio immediate and full reinstatement to their respective former,

or substantially equivalent, positions, without prejudice to their seniority and other rights and privileges and make them whole in the manner set forth in Article V of the Intermediate Report entitled "The Remedy" for any loss of earnings they may have suffered by reason of the discrimination against them;

(c) Preserve and make available to the Board and its agents, upon request, for examination and copying, all payroll records, timecards, personnel record and reports, and all other records necessary or appropriate to an analysis of the amounts of back pay due, and the rights of reemployment, under this Order;

(d) Post at its plant in New Orleans, Louisiana, copies of the notice attached hereto as "Appendix."[4] Copies of said notice, to be furnished by the Regional Director for the Fifteenth Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the Fifteenth Region, in writing, within ten (10) days from the date of this Order, as to the steps Respondent has taken to comply herewith.

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[4] In the event this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

Dated, Washington, D. C., May 20, 1960.

Boyd Leedom, Chairman

Stephen S. Bean, Member

John H. Fanning, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX D

Statutes involved 29 U.S. Code, Section 151 *et seq.*, 61 Stat. 136 *et seq.*, particularly:

Sec. 2(3)

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

Sec. 2(11)

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Sec. 14(a)

"Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no em-

ployer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."